

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 178 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

DAHAYABHAI MOHANBHAI

Versus

DASHRATHLAL MANILAL

Appearance:

Mr. P.V. Nanavati, for the appellant.

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 10/11/2000

ORAL JUDGEMENT

Being aggrieved by the judgment and decree dated 21st March 1983, passed by the then learned Second Extra Assistant Judge, Ahmedabad (Rural) at Narol in Regular Civil Appeal No. 11 of 1982, dismissing the appeal and confirming the judgment and decree passed by the then learned Civil Judge (SD), Ahmedabad (Rural) at Narol on 13th November 1981 in Regular Civil Suit No. 597 of 1979 on his file whereby the suit came to be decreed ordering the present appellant to remove the compound wall, the planks placed near the window of the respondent and also

the staircase placed in the Naveli land and the construction made in the Government land situated between the houses of the parties.

2. Necessary facts leading the present appellant (Ori.defendant) to prefer this appeal may be stated. The houses of the parties are situated in Patelvas at Village Hansol bearing Gram Panchayat Nos 60 & 61, the City Survey numbers of which are 1492, to 1496. The house bearing Gram Panchayat No. 61 belongs to the respondent (Orig.Plaintiff) while the house bearing Gram Panchayat No. 60 belongs to the appellant. There is a naveli in between the two houses which is the Government land. The respondent had constructed his house in 1959 and was enjoying the light and air through the window in the wall of his house. The appellant was very much in know of the fact that the respondent was enjoying the light and air coming through the window and his right was never challenged and his enjoyment was never obstructed. The appellant though having no right in the Government land situated touching his house encroached the said land and converted the same as his compound land and constructed the compound wall around the same, and put up the wooden planks in front of the window causing obstruction to the light and air received by the respondent. The appellant also placing a staircase for going to his upstairs caused obstruction to the respondent while using that naveli land. As the appellant though requested paid no heed in removing the structure he had erected as well as planks and staircase placed, the respondent was constrained to prefer Regular Civil Suit No. 597 of 1979 in the Court of Civil Judge (SD), Ahmedabad (Rural) at Narol which came to be allowed and decree for the injunctive relief as prayed for was passed on 13th November 1981. Feeling aggrieved by such judgment and decree, the appellant preferred Regular Civil Appeal No. 11 of 1982 in the District Court, Ahmedabad (Rural) at Narol which was assigned to the then learned Second Extra Assistant Judge for hearing and disposal in accordance with law. The learned Second Extra Assistant Judge hearing the parties dismissed the appeal with costs on 21st March 1983. It is against that judgment and decree the present appeal is preferred.

3. The learned advocate representing the appellant in order to assail the judgment and decree of the lower appellate court submits that the learned 2nd Extra Assistant Judge did not appreciate the evidence in right perspective and fell into error in drawing the conclusions against the appellant. He has on the basis of the inferences given the findings which are not

tenable in law. The finding that the appellant had encroached upon the Government land was erroneous. The lower appellate Court had also erred in confirming the finding of the trial Court that the land in question did not belong to the appellant. The courts below ought to have considered the fact if at all there was the encroachment of the Government land that either the Panchayat or the Government could have filed the suit; and the respondent had no cause to file the suit.

4. In reply to such contention, the learned advocate representing the respondent submits that in view of Section 91 of the Civil Procedure Code, it is open to the party to file a suit if his right is violated by the act done by the other side amounting to public nuisance and special damage is caused. In the case on hand, the appellant constructed the land around the Government land and placed a staircase and also the planks near respondents' window obstructing his light and air causing nuisance particularly to the respondent as his right to take & air was injured. The respondent had therefore a right to file the suit, as special damages were caused to him.

5. Here is a suit partly for removal of public nuisance and partly for the protection of the right to take light & air through the window. In view of the decision of this Court in the case of Pandya Manubhai Muljibhai alias Himatlal Vs. The Umreth Town Municipality, Umreth and Others - I.L.R. 1964 Guj. Series 1102, a member of the public is not ordinarily entitled to take an action in law for removal of encroachment or public nuisance on a public street without obtaining the consent of the Advocate General u/s. 91 of C.P. Code unless he has sustained special damage. A member of the public however take action if by public nuisance his individual or personal right is violated. In that case, Sec. 91 C.P.C. will not come into play.

6. In the case on hand, because of the above stated construction and the planks and staircase placed on the Government land which is a naveli land through which the respondent has a passage for the purpose of passing and repassing was obstructed. Secondly by putting the planks near the window of the respondent the appellant had obstructed the light and air coming into the respondent's house and thereby injured the individual or personal right of the respondent. He thus by public nuisance sustained special damage too. Such suit therefore will not fall within the ambits of Sec. 91 C.P.C. The

respondent had therefore a right to file a suit for the protection of his individual right and removal of nuisance causing special damage. In view of the facts, Sec. 91 will not be attracted, and consent of Advocate General is also not necessary.

7. Whether the appellant encroached the Government land, whether the land in question really belonged to the appellant and appellant was having the absolute right being the owner to make use of that land are the questions of facts which cannot be inquired into in Second Appeal.

8. Mr. P.V. Nanavati, the ld. advocate for the appellant then took me to the entire evidence and submits that both the courts below erred in giving finding on all the issues favouring the respondent. When a query was made, Mr. P.V. Nanavati had to fairly concede that the contentions he was raising involves the question of fact and not the substantial question of law. It is, therefore, not necessary for me to consider all those questions of facts sought to be raised in Second Appeal because in view of Section 100 of Civil Procedure Code in Second Appeal, this Court can inquire into the merits of the substantial question of law if raised and formulated for determination. At the time of hearing substantial question of law is not being raised and the same is also not formulated at the time of admission hearing, whatever is then sought to be raised involving the factual aspect cannot be permitted to be raised in Second Appeal.

9. For the aforesaid reasons, the appeal fails and is liable to be dismissed. The same is accordingly dismissed with no order as to costs.

rmr.